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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted]51

ANNIE HARRIS, FORMERLY ANNIE FRANCIS; AMOS FRANCIS AND ELIZABETH FRANCIS, MINORS, APPEARING BY W. C. FRANKLIN, GUARDIAN AD LITEM, APPELLANTS,

versus

HARRY H. BELL, J. A. WOOD, H. R. PIERSON, A. C. BRADY, FRANK F. LAMB, A. B. MILLER, MAUDE MITCHELL, W. H. HARRIS, L. A. BELL, H. L. LIGHTSEY, JOHN R. TAYLOR, MACK FRANCIS, J. ORLANDO MITCHELL, HOWELL H. BROWN, THOMAS W. DANIEL, LAURA L. McGINNIS, R. C. MARTIN, H. M. KIRKPATRICK, J. S. KIRKPATRICK, JOHN V. McMAHON, A. W. SHULTHIS, E. J. LAMBERT, W. H. WHITFORD, R. L. EBLING, GERTRUDE WOMACK, HARRY F. EAGAN, EUGENE W. GILL, AND THE HOPPY-TOAD OIL & GAS COMPANY, A CORPORATION, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

GEORGE S. RAMSEY,
WILLIAM M. MATTHEWS,
Counsel for Appellees.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 186.

ANNIE HARRIS, FORMERLY ANNIE FRANCIS; AMOS FRANCIS AND ELIZABETH FRANCIS, MINORS, APPEARING BY W. C. FRANKLIN, GUARDIAN AD LITEM, APPELLANTS,

versus

HARRY H. BELL, J. A. WOOD, H. R. PIERSON, A. C. BRADY, FRANK F. LAMB, A. B. MILLER, MAUDE MITCHELL, W. H. HARRIS, L. A. BELL, H. L. LIGHTSEY, JOHN R. TAYLOR, MACK FRANCIS, J. ORLANDO MITCHELL, HOWELL H. BROWN, THOMAS W. DANIEL, LAURA L. McGINNIS, R. C. MARTIN, H. M. KIRKPATRICK, J. S. KIRKPATRICK, JOHN V. McMAHON, A. W. SHULTHIS, E. J. LAMBERT, W. H. WHITFORD, R. L. EBLING, GERTRUDE WOMACK, HARRY F. EAGAN, EUGENE W. GILL, AND THE HOPPY-TOAD OIL & GAS COMPANY, A CORPORATION, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

Statement of Facts.

The land in controversy is the allotment of Freeland Francis, a member of the Creek Indian Tribe. Prior to

allotment, it was a part of the public domain of the Creek Nation. It is now located in Okmulgee County, Oklahoma. Before the advent of Statehood, it was within the western judicial district of the Indian Territory.

As disclosed by the agreed statement of facts (Record, pages 116-121), Freeland Francis was born on the 30th day of April, 1903, and died on the 22d day of June, 1905, intestate, unmarried, and without issue. He left surviving him as his sole heirs-at-law his mother, Annie Harris, nee Francis; his brother, Amos Francis; his sister, Elizabeth Francis, and a half-brother, Mack Francis. His name was placed upon the final approved rolls of citizenship of the Creek Nation on the 10th day of June, 1905, which gave him the right to share in the distribution of the lands and funds of the Creek Nation. His allotment, however, was not selected during his lifetime.

Freeland is enrolled as a three-quarter blood Creek Indian. His father, William Francis, who died just two months prior to Freeland, was enrolled as a half-blood; while the mother, Annie Harris; the brother, Amos Francis, and the sister, Elizabeth Francis, are enrolled as full-bloods. The half-brother, Mack Francis, is enrolled as a half-blood. Amos and Elizabeth were, at the time of the filing of this suit and during the transactions hereinafter alluded to, minors under the age of twenty-one and eighteen years, respectively.

On the 4th day of December, 1907, there was selected and allotted in the name of Freeland Francis, by the Commission to the Five Civilized Tribes, the land in controversy, and on the 10th day of December, 1908, patents were executed by the principal chief of the Creek Nation.

On the 15th day of January, 1908, Annie Harris, the complainant below and the appellant herein, executed a deed to the defendant, Laura L. McGinnis, conveying to her the allotment of Freeland Francis, and on the 31st day of December, 1909, this deed was filed in the office of the

United States Indian Agent at Muskogee, together with an application addressed to the Secretary of the Interior, requesting that it be approved. On the 6th day of July, 1910, the Secretary of the Interior endorsed his approval upon the deed and returned it to the United States Indian Agent at Muskogee (Record, page 118). The power and authority of the Secretary to approve this deed is the principal question raised by this appeal.

On the 8th day of January, 1909, the defendant, Laura L. McGinnis, executed to the defendants, H. L. Lightsey and John R. Taylor, a warranty deed to the land in controversy.

On the 10th day of March, 1907, W. J. Cook was appointed guardian of the persons and estates of Amos and Elizabeth Francis by the United States Court for the Western District of Indian Territory, sitting at Muskogee, and when Indian Territory became a part of the State of Oklahoma, on November 16, 1907, these guardianship proceedings were transferred to the County Court of Okmulgee County, and thereafter, in the latter part of 1911, the guardian instituted proceedings in the last-mentioned court to sell the interest of Elizabeth and Amos Francis in this allotment; and, after due and timely notice had been given in accordance with the statutes of Oklahoma, their interest was sold at public sale to H. L. Lightsey and John R. Taylor. The sale was confirmed by the court and the guardian directed to execute deed to the purchasers, which was accordingly done on the 15th day of January, 1912. There is no question about the regularity of the probate proceedings. The only question raised by the appellants, as we understand it, is whether or not the deed *should have also been* approved and confirmed by the County Court of Wagner County, Oklahoma, or the County Court of Muskogee County, Oklahoma.

Mack Francis, the half-brother, upon obtaining his majority, sold his interest to Maude Mitchell, who died on the 17th day of September, 1911, leaving surviving her her

husband, J. Orlando Mitchell, and her daughter, Gertrude Womack. The defendant, Eugene W. Gill, acquired the husband's interest. The trial court held that Mack Francis inherited a one-sixth interest, and that the defendants, Eugene W. Gill and Gertrude Womack, had acquired this interest.

After Lightsey and Taylor had purchased the interests of Annie Harris, Amos and Elizabeth Francis, they executed an oil and gas lease to the defendant, A. W. Shulthis, covering the entire allotment. This lease bears date the 5th day of April, 1913. Shortly thereafter Shulthis entered upon the land and drilled an oil well, which produced oil in paying quantities. At the time of the filing of this suit he had expended in improvements and development work the sum of $38,000.00.

This suit was originally instituted in the District Court of Okmulgee County, Oklahoma, by the mother, Annie Harris. She claimed in her petition to be the sole owner of the land in controversy. The cause was removed to the United States Court for the Eastern District of Oklahoma upon the petition of the defendant Shulthis. W. C. Franklin was appointed guardian *ad litem* for Amos and Elizabeth Francis, and after issues joined the cause was tried on the 26th day of July, 1916. The Court held that upon the death of Freeland Francis and the selection of his allotment, the mother, Annie Harris, became the owner of an undivided one-half interest and that Amos, Mack, and Elizabeth, the brothers and sister, each inherited an undivided one-sixth interest. The Court further held that Lightsey and Taylor acquired a good title to an undivided five-sixths interest through the deeds executed by Annie Harris and the guardian of Amos and Elizabeth Francis, and that A. W. Shulthis was the owner of a valid oil and gas mining lease on this undivided five-sixths interest. None of the defendants except Lightsey and Taylor and their lessee, A. W. Shulthis, Gertrude Womack and Eugene W. Gill were

adjudged to own any interest. The other defendants were enjoined from claiming and asserting any title, and the instruments which they held were canceled and set aside. None of these defendants took an appeal and the decree became final and conclusive as to them. Likewise, there is no appeal from the decree in so far as it fixed and determined the interests owned by the respective parties.

Annie Harris, the mother, and Amos and Elizabeth Francis, the brother and sister, by their guardian *ad litem*, appealed to the United States Circuit Court of Appeals for the Eighth Circuit, where the cause was affirmed.

BRIEF AND ARGUMENT.

I.

Where a Creek Indian citizen dies before receiving his allotment and thereafter a certificate and patent is issued in his name, such allotment, so far as restrictions are concerned, is governed by section 22 of the Act of Congress of April 26, 1906, prescribing restrictions on inherited lands, and not by section 19 of that act, prescribing restrictions against alienation by the allottee.

By the act of June 28, 1898, 30 Stat., 495, Congress directed the Commission to the Five Civilized Tribes to make a roll of the Creek Indians. It was provided that each Indian whose name appeared upon the roll should be entitled to participate in the distribution of the lands and funds of the tribe. Section 4 of that act directed the Commission to "allot the exclusive use and occupancy of the surface of all the lands of said nation" to the citizens whose names appeared upon the rolls. The Commission opened a land office in Muskogee, Indian Territory, on the first day of April, 1899, and to each enrolled member who, on or after

that day, made a selection there was allotted one hundred and sixty acres of land.

By the act of Congress approved March 1, 1901, 31 Stat., 861, commonly known as the Original Creek Agreement, it was provided in section 28, that—

> "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.
>
> *"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."*

By the act of Congress approved June 30, 1902, 32 Stat., 177, commonly known as the Supplemental Creek Agreement, it was provided in section 7, that—

> *"All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1st, 1901, subsequent to July 1st, 1900, and up to and including May 25th, 1901, and living upon the latter date, shall be placed on*

the rolls by said Commission. And if any such child has died since May 25th, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

By section 9 of said act it was provided that the names of the children enrolled under the section above quoted "shall be placed upon a supplemental roll of citizens of the Creek Nation, and such supplemental roll, when approved by the Secretary of the Interior, shall in all respects be held to be part of the final rolls of the citizens of said tribe."

By the Indian appropriation act approved March 3, 1905, 33 Stat., 1048, provision was made for the enrollment and allotment of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on the latter date. The pertinent part of this act reads as follows:

> "That the Commission to the Five Civilized Tribes is authorized for sixty days after the date of the approval of this act to receive and consider applications for enrollments of children born subsequent to May twenty-five, nineteen hundred and one, and prior to March fourth, nineteen hundred and five, and living on said latter date, to citizens of the Creek Tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this act; and to enroll and make allotments to such children."

It was under this act of March 3, 1905, that Freeland Francis was enrolled as a citizen of the Creek Nation and was allotted the one hundred and sixty acre tract of land in controversy. The Commission to the Five Civilized Tribes in compiling this roll, designated it "Creek New-Born" roll. We agree with opposing counsel that this act was amendatory to the supplemental Creek agreement and that Con-

gress intended to extend the period of time during which new-born children of Creek citizens should be enrolled. After giving to each citizen of the Nation a one hundred and sixty acre tract of land, there was considerable surplus remaining on March 3, 1905, and the chief purpose of Congress was to allot and dispose of this surplus.

In the original and supplemental agreements, for the purpose of restriction, lands were divided into two classes: First, "Lands of allottees;" second, "Inherited lands and lands allotted in the name of a deceased member." This division runs through all the acts of Congress, as we shall later show, and there was no intention on the part of the law-making body to make any change in these classes by the act of April 26, 1906. Section 19 of that act deals with the first class and reads as follows:

> "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any maner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homestead for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations. *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent

to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

34 Stat. L., p. 137.

Section 22 deals with the second class, and reads as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

34 Stat. L., p. 137.

Under the original and supplemental agreements, "lands allotted to citizens" could not be alienated for a period of

five years. The second class, "the lands allotted in the name of deceased citizens," and inherited homesteads were free from all restrictions. Congress was particular to keep these two classes separate and distinct. In the act of April 26, 1906, on the first class it imposed a restriction on alienation for a period of twenty-five years and prohibited any conveyance unless the restrictions were removed by act of Congress. All restrictions against heirs were removed as to the second class, with a proviso that if the heir was a full-blood he might sell and convey with the approval of the Secretary of the Interior.

The phrase "lands allotted to citizens" has acquired a fixed and well-defined meaning. In the original Creek agreement, in section 7, it is provided that "*lands allotted to citizens* hereunder shall not in any manner, or at any time, be incumbered, taken or sold * * * and any such lands shall not be alienated by the allottee, or his heirs, at any time before the expiration of five years from the ratification of this agreement."

In section 16 of the supplemental Creek agreement we find the same expression, as follows: "*Lands allotted to citizens* shall not in any manner whatever, or at any time, be incumbered, taken or sold * * * nor be alienated by the allottee, or his heirs, before the expiration of five years from the date of the approval of this supplemental agreement."

In section 19 of the act of April 26, 1906, quoted above, is to be found the same expression as follows: "That no full-blood Indian shall have power to alienate, sell, dispose of, or incumber in any manner *any of the lands allotted to him* for the period of twenty-five years from and after the passage and approval of this act."

In the act of May 27, 1908 (35 Stat. L., 312), and in section 1, it provided that "all *allotted lands of enrolled* full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degree of blood,

shall not be subject to alienation, contract to sell * * * prior to April 26th, 1931."

Throughout all these acts the expression, "lands allotted to citizens" and "lands allotted to them" (full-blood citizens), has been construed and interpreted by the courts to mean allotments made in the name of living citizens, and not to include those made in the name of deceased citizens.

In Skelton *vs.* Dill, 235 U. S., 206, this Court had before it the allotment made on behalf of Archie Hamby, who was born in February, 1900, and died in July, 1901. He left surviving him, as his heirs at law, his father, mother, and a sister. Some two or three years after his death his name was placed upon the roll of Creek citizens, and some time thereafter, the date not being given in the opinion, the lands in question were allotted and patented to his heirs. In September, 1905, his heirs executed a deed to L. S. Skelton. After the passage of the act of Congress of April 26, 1906, they executed a second deed to M. S. Wilson, who conveyed to the appellee, William H. Dill. It was Skelton's contention that the original and supplemental agreements never imposed any restrictions upon lands of that character; while it was Dill's contention that they did. It was further contended that the restrictions so imposed were removed by section 22 of the act of April 26, 1906, which provides that the death of the allottee shall operate to remove all restrictions, except that where the heirs are full-bloods, in which case the deed shall be approved by the Secretary of the Interior; and the heirs of Archie Hamby not being full-bloods, an approval of their deed was not necessary. The trial court sustained Dill's contention and upon appeal the decree was affirmed. However, the Federal Supreme Court reversed the decision of the Supreme Court of Oklahoma, and held that the original and supplemental agreements never imposed any restrictions upon lands of that character, and upheld the validity of Skelton's deed.

In the opinion, by Mr. Justice Van Devanter, it is said:

> "Whether these restrictions were intended to apply only to allotments made to living citizens in their own right, or to apply as well to allotments made on behalf of deceased members, is the question for decision. The Supreme Court of the State, when passing upon this case, held them applicable to both classes of allotments, but in the later case of Rentie *vs.* McCoy, 35 Okla., 77; 128 Pac., 244, reached the other conclusion, as did also the District Court for the Eastern District of Oklahoma in Reed *vs.* Welty, 197 Fed., 419. We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of section 16 of the supplemental act lend themselves to that view, but in those sections of both acts which deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate, and reflects a corresponding difference in purpose. In Mullen *vs.* United States, 224 U. S., 448; 56 L. Ed., 834; 32 Sup. Ct. Rep., 494, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right, but not to allotments on behalf of members then deceased. We do not perceive anything in the acts relating to the Creek lands which calls for a different conclusion."

In the Skelton case, *supra*, it was expressly held that section 7 of the original agreement and section 16 of the supplemental agreement, in imposing five-year restrictions upon "land allotted to citizens" did not apply to nor affect the "lands allotted in the name of those who had died before receiving their allotment." So in the act of April 26, 1906, when it uses the words "lands allotted to him" (full-blood), it must have been used in the same sense in which it was

used in the other acts of Congress, and the same judicial construction applicable to the earlier acts would also apply with equal force to this one. And especially is this true, since there is no inclination on the part of Congress to change the division of the two classes.

In Mullen *vs.* The United States (224 U. S., 4148) it was held that section 22 of the Choctaw and Chickasaw agreement imposed no restrictions upon the lands allotted in the name of the deceased citizens, and that the heirs might sell and convey, regardless of their blood, without the approval of the Secretary of the Interior or any other authority.

In Talley *vs.* Burgess (246 U. S., 104) this Court expressly held that lands of this character fall within section 22 of the act of Congress of April 26, 1906, and not within section 19. That suit involved the allotment of David S. Burgess, a Cherokee Indian citizen, who died without having selected or received his allotment. Nora B. Burgess was appointed administrator of his estate. A minor heir of the deceased, through his guardian, entered into a contract with the plaintiff Talley, by the terms of which he agreed to give Talley one-half of his interest in the allotment in consideration of Talley's performing certain legal services in connection with a contest over it. Talley performed the services agreed upon and brought suit upon the contract. The contract was never approved by the United States court, as provided by section 22 of the act of April 26, 1906. The plaintiff contended that section 22 was not applicable and that the contract, although not approved by the court, was valid. The defendant contended that section 22 was applicable and that the contract was void. The court sustained the contention of the defendant in the following language:

> "It is contended that this section (section 22) applies only to heirs of a deceased Indian whose selection has been made by himself, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which the decedent belonged. But in

> our view Congress, in the passage of No. 22, had in contemplation that Indians duly enrolled and entitled to share in the tribal property and lands might die before receiving the allotment to which he or she was entitled. Congress had made provision in No. 20 of the Cherokee agreement that such land might be allotted in the name of the deceased, and should, with the proportionate share of the other tribal property, descend to the heirs of the one who would have been entitled, if living. It also provided that the selection for a decedent should be made by a duly appointed administrator or executor, or, in default of such selection, the Dawes Commission should designate the land to be allotted. We think minor heirs who thus receive lands are within the meaning and purpose of the statute; as much so as they would have been had the land been selected by the ancestor in his lifetime."

Lands of the class under consideration were unrestricted by the original and supplemental creek agreements. Restrictions were first imposed upon them by section 22 of the act of April 26, 1906. That act imposed upon lands alloted to *living* full-blood allottees restrictions for a period of twenty-five years, and provided that they should not be alienated or sold unless the restrictions were removed by an act of Congress. It would be strange indeed for Congress to take lands allotted to heirs out of the unrestricted class and put them into the *most* restricted class, especially in view of the removal of restrictions against alienation by heirs subject alone to the *one* restriction against full-blood heirs requiring the approval of the Secretary of the Interior. Running through all the legislation with reference to Indian lands, Congress has clearly manifested a purpose to give the Indian some freedom in dealing with lands of this character, in order that he might have some experience in the management of his estate. After dealing with a piece of inherited land, an Indian would certainly be better qualified to deal with his own allotment and would in some measure at least be better

qualified to take upon himself the burdens and duties of citizenship.

The general tendency of Congress in dealing with Indian lands is set forth in an article by Honorable Franklin K. Lane, Secretary of the Interior, in the January, 1915, number of The National Geographic Magazine, in which he says:

> "Yet I am of the opinion that it would be better, far better, to sever all ties between the Indian and the Government, give every man his own and let him go his own way to success or destruction, rather than keep alive in the Indian the belief that he is to remain a ward of the Government. The advocates of sink-or-swim policy may be reckless. The advocates of the almshouse policy are surely doing harm.
> * * *
>
> "It is the judgment of those who know the Indian best, and it is my conclusion, after as intimate a study as practicable of his nature and needs, that we should henceforth make a positive and systematic effort to cast the full burden of independence and responsibility upon an increasing number of the Indians of all tribes."

The construction of section 19 of the act of April 26, 1906, contended for by appellants, would run contrary to the views expressed by the head of the Department which has charge and control of the Indian affairs. Certainly, if Congress and the Department of the Interior had intended to reverse their policy in dealing with the Five Civilized Tribes, by imposing the most drastic restrictions upon lands that had before been unrestricted, it would have given some clear unequivocal utterance to that effect. It would be a strained and unnatural construction of the act to say that it was intended to prohibit the alienation of this class of land except by an act of Congress, although the heir could sell lands he actually inherited from a deceased Indian who got his allotment before death, provided the secretary approved the deed. *There could be no reason for imposing greater restrictions upon*

lands allotted in the name of deceased citizens than upon lands inherited in a technical sense.

The Circuit Court of Appeals reached the conclusion, in rendering its decision in this cause, that Talley *vs.* Burgess, *supra;* Brader *vs.* James, disposed of this contention, expressly holding that this case falls squarely within the rule announced in those cases. In rendering the decision Judge Sanborn (250 Fed., 211) says:

> "The Supreme Court, however, on March 4, 1918, decided, in cases not distinguishable from that here in hand, that full-blood heirs of a deceased enrolled citizen of one of the Five Civilized Tribes, on whose account an allotment was selected after his decease by an administrator or by the Dawes Commission, are subject to the restriction in section 22 of the act of April 26, 1906, to the effect that all conveyances made thereunder by heirs who are full-blood Indians are subject to the approval of the Secretary of the Interior. 34 Stat., 145; Brader *vs.* James, 246 U. S., 88; 38 Sup. Ct., 285; 62 L. Ed., —; Talley *vs.* Burgess, 246 U. S., 104; 38 Sup. Ct., 285; 62 L. Ed., —. And this court has followed that decision. David *vs.* Youngken (filed April 3, 1918), 250 Fed., 208, — C. C. A. —.
>
> "In view of these decisions, the question arises whether or not Annie's deed, made on January 15, 1908, and approved by the Secretary of the Interior on July 6, 1910, constituted a lawful conveyance. Counsel for the appellants insist that it did not: First, because, as they insist, she and the brothers and sisters of Freeland Francis took as allottees, and not as heirs, and she and they were prohibited from alienating their interests in the land by sections 5 and 19 of the act of April 26, 1906, 34 Stat., 138, 144; and, second, because the power of the Secretary to approve her deed under section 22 of that act was revoked by the act of May 27, 1908, 35 Stat., 312, 315, No. 9. But the first contention is inconsistent with the decision of the Supreme Court in Brader *vs.* James, and of this Court in David *vs.* Youngken, cited above. In those cases the Supreme Court and this Court had

before them the question what restrictions were imposed by the act of April 26, 1906, upon the alienation of their lands by full-blood descendants of deceased Indians, in whose names those lands had been selected and allotted after their death, and they called such descendants heirs, and held that the restrictions imposed by section 22 governed their right of alienation."

II.

By section five of the act of April 26, 1906, and section 32 of the act of June 25, 1910, Congress declared there was no distinction between inherited lands and lands allotted in the name of deceased Creek citizens.

Section 5 of the act of April 26, 1906, 34 Stat., 137, reads as follows:

> "That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect."

This statute is not entirely free from ambiguity, on account of the insertion of a clause dealing with foreign matter between the first and last sentences of the section. Furthermore, it provides for the issuance of patent in the name of deceased "allottee" and seems to contemplate by the use of "allottee" that a selection should have been made during the life of such deceased citizen. Congress, in order to obviate any legal controversy, and in order to remove the matter

from the realm of doubt, passed the act of April 25, 1910, 36 Stat., 863, section 32 of which reads as follows:

> "Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

This statute is both retroactive and prospective in its operation. It applies to all patents and certificates of allotment that have been theretofore issued as well as those that may be thereafter issued. Although the statute was passed after the date of the patent to the allotment in controversy, nevertheless, when read in connection with section 5 of the act of April 26, 1906, it is just as effectual to accomplish the purpose intended by Congress as though it had been passed prior to the date of the patent. It not only declares all patents theretofore issued to be valid, but expressly provides that if a citizen has died before receiving his conveyance the title "shall inure to and become vested in his heirs, devisees and assigns *as if the deed had issued to the deceased grantee during life.*" (Italics ours.) This act makes no reference to allottees and cannot be construed as meaning that its application presupposes an allotment—that is, one who died after making a selection but before the issuance of a patent or deed. Congress intended by this act to explain and make plain section 5 of the act of April 26, 1906. In construing an act of the legislature, subsequent acts may be looked to and read in connection therewith in order to ascertain the intent of the law-making body.

Tiger *vs.* Western Investment Co., 221 U. S., 286.

Section 5 of the act of 1906 provides for the issuance of a patent in the name of an allottee, whether such patent issues

before or after death. It makes the patent effective not only to pass title to the allottee if living, but to pass title to his heirs or his legal assigns if he died before the issuance of patent, and that it should operate just as effectually in one case as in the other.

Under the original and supplemental agreements, where a citizen died before the selection of his allotment was made, the certificate and patent were issued to his heirs. We do not mean to say, however, that the names of the heirs are set out in these instruments. Assuming that the name of the allottee was John Smith, then these instruments would read, "To the heirs of John Smith." It often happened that the certificate of allotment and patent were actually issued to a deceased citizen, and it has generally been held that such certificate and patent conveyed no interest to the heirs in the absence of a statute expressly providing that they should operate to convey title. The Commission to the Five Civilized Tribes, upon receiving information to the effect that a citizen had died prior to the time of the issuance of the patent to him, generally recalled and cancelled the patent and issued a new one to his heirs. But that proved immaterial under opinion in U. S. *vs.* Wildcat, 244 U. S., 111.

It seems entirely plain that Congress intended by these two acts to abolish all distinction between lands inherited in a technical sense and lands allotted in the name of a deceased citizen. It was intended to make this allotment a part of the estate of Freeland Francis, and to have it descend to his heirs as though patent had issued to him during his lifetime. The patent must issue in his name, and when so issued "the title to the lands described therein shall inure to and vest in his heirs." If Congress had stopped with this declaration, the appellants' argument would be more plausible, but when it is further provided that the patent should have the same effect as if "it had issued to the allottee during his life," the last vestige of doubt as to the meaning and purpose of Congress is removed. It is clearly intended to place this class

of lands in the same category with reference to restrictions as lands inherited in a technical sense. This court and the Circuit Court of Appeals for the Eighth Circuit have construed these sections and reached the same conclusions for which we are here contending.

In Shulthis *vs.* McDougal, 170 Fed., 528 (C. C. A., Eighth Circuit), the court held that where lands were allotted in the name of deceased citizens the heirs do not take as original allottees. In discussing the meaning of section 28 of the original Creek agreement, which provides that where a person dies before receiving his allotment "the land and money to which he would be entitled if living shall descend to his heirs and be allotted and distributed to them," the court says:

> "The word 'descend' is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplates the death of the child before he had actually become seised of any interest in the land. The word 'descend' is a word of art, and indicates the transference of property by inheritance. If any significance is to be given to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seised of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall 'descend,' but also declares that it shall be 'allotted and distributed,' to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.
>
> "This construction receives further support by the general scheme which the Federal Government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages between members of the tribe and members of the white and negro races, and by reason of the fraud-

ulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership proved a much more difficult task than was at first anticipated. The commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of months, it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to provide for all members of the tribe who were born subsequent to the beginning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts, when the roll was completed, it contained more names than there were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds; but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progress, some persons whose names were on the roll would die, the statute made provision for the disposition of the share of tribal property which would go to them if living. Such a provision was necessary. Otherwise there would have been a portion of the tribal property undistributed. It was never the intent, however, either of the tribe or of the Federal Government to grant to parties having a kinsman who had died before the actual making of the allotment additional lands as a bounty. These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seized of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

"Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1879, 34 Stat., 138) provides

> " 'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'

"Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

This statute has been construed by the Supreme Court in the case of Perryman *vs.* Woodward, 228 U. S., 148. Squire Saunders had set apart to him by the Creek Nation a lot in the city of Muskogee. Shortly thereafter, on October 22, 1900, he died intestate. The patent was issued on the 26th day of January, 1904, and the question arose as to whether or not that lot, under the above-quoted statute, constituted a part of his estate, or did his heirs take as original purchasers. The court, in holding that they were not original purchasers or allottees, says:

> "The title of the defendant depends upon the effect of a decree of the probate court, made on November 16, 1900, finding that the estate of Squire Saunders did not exceed $300, and ordering and adjudging that

the same do vest absolutely in his widow. If valid, it is decided that this decree embraces the land in controversy. Squire Saunders having the possessory right to the lot, which lay in the town of Muskogee, Creek Nation, Indian Territory, it was awarded to him by the townsite commission. On October 22, 1900, he died intestate. On January 26, 1904, a deed was made by the principal chief of the Muskogee (Creek) Nation, approved by the Secretary of the Interior, purporting to convey the same to him.

"The act of June 25, 1910, chap. 431, 432, 36 Stat. at L., 855, 863, provided that 'where deeds to tribal lands in the Five Civilized Tribes have been or may be issued * * * to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.' The intent and meaning of this statute, in our opinion, was to make the patented land part of the estate of the nominal patentee *quoad hoc*—the most important words being *'as if the deed had issued to the deceased grantee during life.'* The section was not intended to exclude other provisions of law otherwise applicable and to give a title at all events to their heirs or other party named in the act as purchaser." (Italics ours.)

The purpose of Congress in enacting the second provision of section 5 is apparent. It provides:

"In case any allottee shall die after restrictions have been removed his property shall descend to his heirs or his assigns as if the patent or deed had issued to the allottee during his lifetime."

This provision was inserted for the purpose of removing any doubt as to whether or not the lands could be alienated before the issuance of patent.

So that instead of this clause of section 5 showing an intent on the part of Congress to impose restrictions on land that had theretofore been unrestricted, it shows the opposite

intent to give a greater freedom in the sale of lands of this class by permitting the heirs to execute deeds without waiting for the formal issuance of patents.

III.

The approval of the deed executed by the appellant Annie Harris to Laura A. McGinnis by the Secretary of the Interior on the sixth day of July, 1910, operated to remove all restrictions and make the deed valid.

The appellant Annie Harris executed a deed to the defendant Laura A. McGinnis on the 15th day of January, 1908, conveying the allotment of Freeland Francis. This deed was subsequently filed in the office of the United States Indian Agent in Muskogee together with a part of the purchase price, accompanied by an application, addressed to the Secretary of the Interior, asking that the deed be approved. On July 6, 1910, the Secretary endorsed his approval upon the deed (Record, page 118).

This appeal is being taken by representatives of the Department of the Interior, presumably under the orders of the Secretary of the Interior. It seems strange that after the Secretary has placed his stamp of approval upon this transaction, and the appellees, relying upon his good faith, have gone upon the premises and drilled six or seven oil and gas wells and expended approximately $40,000.00, that he should now question his own authority and seek to deprive the appellees of the benefit of their bargain. It will be presumed, however, that the Secretary was acting in good faith when he approved the deed and all doubts will be resolved in favor of the validity of the approval.

This deed was executed at a time when the act of April 26, 1906, was in full force and effect and before the passage of the act of May 27, 1908, especially section 9 thereof (35

Stat. at Large, p. 312). Appellants contend that the Secretary of the Interior had the power to approve a deed at any time between the dates of the above-mentioned acts, but that after the enactment of the last-named law, his power to approve conveyances was terminated and the authority theretofore given him was vested in the various county courts. There is grave doubt as to whether the act of May 27, 1908, was a complete substitution of the act of April 26, 1906. That could only be determined by examining all the terms and provisions of both acts. This would entail upon the court an enormous amount of labor. That question is not involved in this appeal and it is unnecessary for either court or counsel to pursue it at length.

Appellees contend that the approval is valid for two reasons: (*a*) The validity of the deed and of the approval must be determined by the law in force at the time of the execution of the deed; and (*b*) it was expressly provided in section 1 of the act of May 27, 1908, that the Secretary should continue to exercise the authority to remove restrictions as he had theretofore exercised.

(*a*) The form of the deed, the right of the grantor to convey, the legal formalities, in fact, the entire validity of the deed is determined by the law in force at the time of its execution. If a deed, valid at the time of its execution, should be placed in escrow and before its delivery an act should be passed declaring instruments of that character void, such act would not affect it, because, upon delivery, the doctrine of relation would apply and the deed would become a valid instrument from the date of its execution. So in this case the approval by the Secretary of the Interior related back to the date on which the deed was executed and made it valid from that date. It has been expressly so held by this Court in two cases: In Lomax *vs.* Pickering (145 U. S., 310) the land involved was patented to Alexander Robinson, a member of one of the Indian tribes, and his

children, under the Treaty of Prairie Du Chien, which prohibited alienation of the lands except with approval of the President of the United States. Thereafter, on the third day of August, 1858, the patentee, joined by his wife, executed a deed to John F. Horton. This deed was not approved by the President of the United States until January 21, 1871, thirteen years after its execution. In the meantime Horton had died. This Court held the approval valid, and further held that the lapse of time did not affect the power of the President to approve. The doctrine of relation was applied to the transaction and the act of approval became effective from the date of the execution of the deed. In discussing the doctrine of relation, it was held that the "ratification operates upon the act ratified precisely as though authority to do the act had been previously given." To be sure, if the doctrine of relation is applied, the fact that the grantee had died between the date of the deed and the date of its approval could not affect its validity. On this point the Court said:

> "Nor do we consider it material that the grantee had in the meantime died, since if the ratification be retroactive, it is as if it were indorsed upon the deed when given, and enures to the benefit of the grantee of Horton, the original grantee—not as a new title acquired by a warrantor subsequent to his deed enures to the benefit of the grantee, but as a deed imperfect when executed, may be made perfect as of the date when it was delivered."

In Lykens *vs.* McGrath (184 U. S., 169), the land involved was patented to David Lykens, an Indian. Under a provision of a treaty between his tribe and the United States, he was prohibited from alienating except with the approval of the Secretary of the Interior. On June 3, 1864, he executed a deed to Baptiste Peoria, which was shortly thereafter presented to the Secretary for approval. Before the Secretary acted upon the application, the grantor died and ap-

proval was endorsed upon the deed after his death. It was contended that the death of the grantor before the approval of the deed rendered it null. The Court, however, again applied the doctrine of relation and held that the Secretary's approval related back to the date of the instrument and it became valid from the date of its execution.

This identical question was before the Circuit Court of Appeals for the Eighth Circuit in Anchor Oil Company *vs.* Gray (257 Fed., 277). The land involved was the allotment of Jennie Samuels, a full-blood Creek Indian, who executed an oil and gas mining lease on December 5, 1914, to the defendant, W. H. Gray. After the lease had been submitted to the Secretary of the Interior, but before its approval by him, the lessor died. The Secretary of the Interior endorsed his approval upon the lease on October 21, 1915. After the death of the original allottee, her heirs executed oil and gas leases to the plaintiff, Anchor Oil Company, which were approved by the county court having jurisdiction of the estate of the deceased. It was the contention of the appellant that the death of the allottee divested the Secretary of the Interior of any power to approve any instrument affecting the title to the land because the act of May 27, 1908, expressly conferred upon the county courts of Oklahoma power to approve instruments of that character. Section 9 of that act expressly provided that the death of an allottee shall operate to remove all restrictions upon the alienation of his allotment, with a proviso that where the heirs are full-bloods, the deeds must be approved by the courts having jurisdiction of their estates. The Circuit Court of Appeals, in holding lease executed by Jennie Samuels during her lifetime, and the approval of the Secretary of the Interior, valid, said:

> "But where the validity of a convayence of land or of leases thereof is conditioned by the approval of different officers or by different restrictions at different times, the law in force at the time of the deed or lease

determines the restriction upon its validity, and where at that date a specified officer is empowered to approve and validate it, that officer, or his successor in office, may lawfully do so after subsequent legislation has conditioned the validity of like conveyances or leases with the approval of a different officer or with different restrictions, and the true construction of section 9 of the act of May 27, 1908, is that it is prospective and not retrospective in effect, that it applies to conveyances and leases made after its passage and is inapplicable to those made before its enactment, and that the Secretary of the Interior had plenary authority to approve and validate the lease of Jennie Samuels after her death notwithstanding the provision of section 9 of the act of May 27, 1908. Scioto Oil Co. *vs.* O'Hern (Okl.), 169 Pac., 483; Harris *vs.* Bell, and authorities cited in 250 Fed., at page 214, 162 C. C. A., 345.

"Counsel insist, however, that the Secretary's power to approve the lease ceased because under section 9 of the act of 1908 the death of the lessor removed all restrictions upon alienation of the land. But that removal did not change the status of Jennie Samuels' lease, did not remove the restriction upon the alienation by her, for those restrictions persisted until she died, and she could not alienate her land after her death. She had leased her land, subject only to the approval of the Secretary, and her heirs, so far as her lease was concerned, stepped into her shoes upon her death. The lease estopped them, as it did her, from revoking it or conveying the land free from it, unless the Secretary, in the exercise of his judicial discretion, refused to approve it, and, when he approved it, the estoppel became absolute upon all of them alike."

A similar question arose in the case of Scioto Oil Co. *vs.* O'Hern, 169 Pac., 483 (Okl., not yet officially reported). Albert Cooper, a full-blood citizen of the Creek Nation, executed an oil and gas lease covering his allotment on August 16, 1912, to John M. Ingram which was transmitted to the Secretary of the Interior for his approval. Cooper died before the Secretary had acted. After the death of the allottee

the lease was duly approved and was subsequently assigned to the Scioto Oil Company, who entered into possession of the land and began operations for the purpose of extracting the oil and gas thereunder. Before the Secretary approved the oil lease, the heirs of Cooper executed deeds to O'Hern, which were duly approved by the courts having jurisdiction over the settlement of the estate. The Supreme Court of Oklahoma, in holding the lease and approval of the Secretary of the Interior valid, says:

> "The contract is not assailed on any of the grounds which usually render contracts invalid, but solely upon the ground that prior to the approval thereof by the Secretary one of the parties had died, and that the Secretary's power or authority to approve the same had lapsed, because the death of the allottee operated to remove the restrictions against the alienation thereof under section 9, act Congress May 27, 1908, c. 199, 35 Stat., 315. This contention cannot be sustained.
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> "In Almeda Oil Co. *vs.* Kelley, *supra*, a lease had been executed and submitted to the Secretary for his approval, and prior to the approval thereof the restrictions of the allottee had been removed, and he thereafter changed his mind and desired to withdraw from said lease, but same was afterward approved by the Secretary. It was contended that because restrictions against the alienation of said land had been removed the Secretary had no right to approve the lease over his protest and objection. This contention, however, was denied, and it was held in accordance with what we have already stated that the contract only needed the approval of the Secretary to be valid in every particular, and that the approval of the Secretary related back to its execution and rendered it valid from that time, and it was further held that, if the removal of restrictions upon the allottee's complete right to lease would have any effect whatever, it would be to render the contract of the parties complete, to be annulled only on or for some of the grounds under which equity gives relief.

* * * The purpose of requiring the lease to be approved by the Secretary was to see that the allottee should not be wronged in any lease he might desire to make, and that the consideration should be ample, and that the lease be subject to no unreasonable qualifications. It was not to prevent the leasing of the premises, but to guard against imposition therein, and when the Secretary approved the lease it was a determination that the purposes for which the restriction was imposed had been fully satisfied, that the consideration was ample, and that there were no unreasonable stipulations contained in the contract. When this was accomplished, justice requires that the lease should be upheld, and to that end the doctrine of relation attaches to the approval of the lease and makes it operative as of the date of the execution thereof. The situation is very much like that where a deed has been fully executed and placed in escrow to be finally delivered on performance of a condition, and the brothers and their grantees who took with the notice imparted, under the act of March 1, 1907, by the filing of the lease in the office of the Indian Agent, Union Agency, Muskogee, acquired no equities superior to those of the lessee and his assignee. The brothers were heirs of the allottee, and took all of the title which he had at his death, but when the Secretary approved the lease their claims as heirs cannot be compared in equity with those of the lessee. They are not in the attitude of *bona fide* purchasers, and the doctrine of relation intervenes and makes the approval by the Secretary retroactive and effective as of the date of the lease, and, as the brothers and their grantee have no equitable rights superior to those of the lessee, it follows that the lease must be upheld."

United States *vs.* Knight, 206 Fed., 145 (C. C. A., 8th Cir.) expressly holds that the deed is valid if approved in accordance with the law in force at the date of the deed. The facts of that case, briefly stated, are these: The land in controversy had been allotted and patented to Darkey Stop,

a full-blood Indian, who died November 11th, 1906, leaving as his sole surviving heir at law his daughter, Caniyah Stop. On October 12th, 1908, Caniyah Stop executed and delivered a deed to Morris F. Knight and Cyrus S. Avery, the appellees. This deed was approved by the county court having jurisdiction of the settlement of the estate of Darkey Stop. The question before the court was as to whether the approval by the county court was valid, or whether it should have been approved by the Secretary of the Interior.

In rendering the opinion the court says:

> "And as it cannot be claimed or pretended that the death of the allottee in anywise affected the requirement of approval, either by the Secretary of the Interior or by the county court in Oklahoma having jurisdiction over the settlement of the estate of the deceased allottee, it is clear that the decision of the question involved in this case simply requires us to determine as to what law, in regard to the approval of the deed of the Indian heir, was in force at the time Caniyah Stop executed and delivered the deed in question to Knight and Avery. There ought not to be, and we do not believe there is, any doubt about this. Prior to the passage of the law of April 26, 1906 (section 22), full-blood Indian heirs, being members of any of the Five Civilized Tribes in Oklahoma, could not convey their allotted lands unless there had been actual removal of restrictions by the Secretary of the Interior prior to the conveyance. On and after the above last-mentioned date down to the passage of the law of May 27, 1908 (section 9), conveyances by full-blood Indian heirs were valid if subsequently approved by the Secretary of the Interior. After the passage of the law of May 27, 1908, the last expression of the will of Congress as to how such deeds should be approved is found in section 9 hereinbefore quoted, and that law was complied with in regard to the deed of Caniyah Stop. * * *
>
> "We therefore conclude that, as the death of the allottee in no wise affects the requirements as to approval, the deeds of Indian heirs must be approved

in accordance with the law in force at the date of the deed."

If the decisions of the Circuit Court of Appeals of the Eighth Circuit and the Supreme Court of Oklahoma, holding that the law in force at the time of the execution of the deed is the one which determines not only the validity of the instrument but the power of the officer to ratify them, the approval of the Secretary of the Interior, endorsed upon the deed executed by the appellant, Annie Harris, related back to the date of the deed and rendered it valid from that time.

(*b*) In the absence of any legislation, the Secretary of the Interior had authority to approve the deed in question, but in order to eliminate all controversy and remove all doubt, Congress expressly provided in the act of May 27, 1908, that the Secretary of the Interior should not be prohibited from exercising the same authority in the approval of deeds that he had theretofore exercised. Section 9 of that act reads as follows:

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. * * *"

In section 1 of the same act it is also provided that

> "The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."
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> 35 Stat., 312.

Under this act the Secretary of the Interior was given the same power and authority to remove restrictions and approve deeds on Indian lands which had been given him under any prior law or act of Congress. It is therefore necessary to ascertain whether or not any act of Congress passed before May 27, 1908, gave the Secretary of the Interior the power to approve a deed of this character. Under the act of April 21, 1904, 33 Stat., 204, the Secretary was given the power to remove all the restrictions on the alienation of any lands of allottees of either of the Five Civilized Tribes of Indians under such rules and regulations as he might prescribe. The act of April 26, 1906, section 22, provides that the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made or to whom deed or patent has been issued, can sell and convey the land inherited from such deceased. That section, however, contains this proviso: "All conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe." This deed falls square within the class of lands dealt with in this proviso, and had no subsequent legislation been enacted, the power of the Secretary to approve a deed of this character could not have been questioned. The only other legislation dealing with inherited lands of full-blood Indians is the act of May 27, 1908, and by that act it is expressly provided that the Secretary of the Interior shall continue to exercise the same authority in the removal of restrictions as he had theretofore exercised. The purpose of Congress seems clear, therefore, to grant him the same power in the removal of restrictions under the act of 1908 which he had exercised under the act of 1906.

IV.

Under the act of May 27, 1908, interests of full-blood Creek Indian minors in inherited lands can be sold through the county courts of Oklahoma having jurisdiction of their estates, and approval of guardian's deeds by those courts renders them valid.

The appellees, Lightsey and Taylor, not only obtained a conveyance of the interest of Annie Harris, the mother, in the allotment of Freeland Francis, but also purchased at a sale made through the Probate Court of Okmulgee County, the interest of Amos Francis and Elizabeth Francis, the brother and sister of Freeland Francis. This deed was regularly approved and confirmed by the County Court of Okmulgee County. It is not controverted that this court had jurisdiction both of the persons and estates of these minors.

The deed from Annie Harris to Lightsey and Taylor was executed at a time when the act of April 26, 1906, was in force and it is our contention that the terms and provisions of that act governed the validity of that deed as well as the authority and power of the Secretary of the Interior to approve it. The guardian's deed, on the other hand, was executed on the 15th day of January, 1912, at a time when the act of May 27, 1908, was in force and it is appellees' contention that the terms and provisions of that act govern and determine its validity. Under the last-mentioned act it was not necessary for the minor heirs to join in a deed executed by the adult heirs, but the guardian has authority to execute separate conveyances to the interests owned by his ward. Had this guardian's deed been executed at a time when the act of April 26, 1906, was operative, there might have been some ground for the contention made by the appellants on page 51 of their brief. In other words, the act of April

26, 1906, provides that the interest of minors in inherited lands may be sold by their guardian joining in the same with the adult heirs, but the act of May 27, 1908, makes no such requirement, and in giving the county courts of Oklahoma unlimited jurisdiction of the estates of these minors it excludes any intention on the part of Congress requiring the adults and guardians of minors to join in the same deed.

The guardian's deed was approved and confirmed by the County Court of Okmulgee County on the 15th day of January, 1912. The order of confirmation reads as follows (pages 159B and 159C printed record):

> "That said sale was made after due notice as prescribed by said order of sale; that said purchaser was the highest bidder therefor, and said sum the highest and best sum bid; that said sale was legally made and fairly conducted; that said sum is not disproportionate to the value of the property sold, and that a sum exceeding such bid at least ten per cent exclusive of the expense of a new sale cannot be obtained, and that the said Wm. J. Cook in all things proceeded and conducted and managed such sale as required by the statute in such case made and provided, and as by said order of sale required and directed.
>
> "It is therefore ordered, adjudged and directed by the court, that the said sale, be and the same is hereby confirmed and declared valid, and the said Wm. J. Cook is directed to execute to said purchaser proper and legal conveyance of said real estate."

It is appellees' contention that this order constitutes sufficient compliance with the act of May 27, 1908, and that any further act on the part of the County Court of Okmulgee, or of any other county court in the State of Oklahoma, would have been useless.

In Chupco *vs.* Chapman, 170 Pac., 259, the Supreme Court of Oklahoma held that the order of confirmation was a sufficient approval of a guardian's deed conveying inherited

lands of a full-blood Indian minor. The court, in that opinion, says:

> "It is next urged, that, even though it be held that the probate court of Hughes County had jurisdiction to order and confirm the sale of the inherited interests of the minor plaintiffs in the allotments of Katie and Amos Chupco, said guardian's deeds were invalid, because not approved by the court having jurisdiction of the settlement of the estate of the deceased allottee. In other words, counsel says that, in addition to confirming the guardian's sale and directing the guardian to execute a deed in pursuance thereof, it was necessary that the guardian's deed be approved in a separate proceeding by the county court. We do not think there is any merit in this contention. The statute provides:
>
> " 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.' "

Appellants do not contend that there is any irregularity in the probate proceedings leading up to the execution of the guardian's deed, by which the interests of the appellants, Amos Francis and Elizabeth Francis, were conveyed to the appellees, Lightsey and Taylor. The sale was had in all respects as provided by the laws of the State of Oklahoma. It is their contention that by the act of May 27, 1908, Congress prohibited the sale of the land in controversy, except with the approval of the court having jurisdiction of the estate of the deceased allottee; and that that act was not complied with in that the deceased died before Oklahoma became a State, in what is now Wagoner County, and that the guardian's deed was approved by the County Court of Okmulgee County.

On the other hand, it is our contention: *First,* that the administrator, having been appointed before statehood, by the territorial court, and the County Court of Okmulgee County having been made its successor, it was the proper court to

approve this deed; *second,* that section 9 of the act of May 27, 1908, must be read in connection with other provisions of that act, and that courts having jurisdiction of the estates of deceased full-bloods must approve the deeds executed by their full-blood heirs, *except in cases where jurisdiction is given to some other court by that act.*

It is not necessary to enter into the details of the creation and organization of the territorial courts in the Indian Territory. Suffice to say by the act of May 2, 1890, Congress created a court of general jurisdiction for the Indian Territory and adopted and put in force the probate and civil codes of procedure from the State of Arkansas. The business of this court became so congested that it was necessary to create additional courts, and by the act of Congress of February 27, 1902, the Indian Territory was divided into four judicial districts, the Northern, the Southern, the Central, and the Western.

Section 8 of that act provided that the Creek Nation and Seminole Nation, together with a small part of the Cherokee and Choctaw Nations, should constitute the Western Judicial District. It was also provided by that same act that terms of court should be held at Okmulgee, Muskogee, Wagoner, etc. There was a large amount of business pending in this court in the year 1907, and section 19 of the Enabling Act (34 St. L., 267) passed by Congress on June 16, 1906, provided that the courts of original jurisdiction, created by the State, should be deemed to be the *successors* of the courts of original jurisdiction of the Territory.

Section 19 reads as follows:

> "That the courts of original jurisdiction of such State shall be deemed to be the successors of all courts of original jurisdiction of said Territories, and as such shall take and retain custody of all records, dockets, journals, and files of such courts, except in causes transferred therefrom, as herein provided; * * *."

In section 20 it is provided:

> "That all causes, proceedings, and matters, civil or criminal, pending in the District Courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territories become a State, not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be proceeded with, held and determined by the courts of said State the successors of said District Courts of the Territory of Oklahoma, and the United States courts in the Indian Territory; * * *."

Provision was duly made, by sections 23 and 27 of the Schedule of the Constitution of the State of Oklahoma, for transferring the records and files of the United States courts to their successors created by the State Constitution. The Indian Territory and Oklahoma Territory were created into a State on November 16, 1907. On that day the United States court for the Western District of Indian Territory passed out of existence, and was succeeded by the county and district courts of the various counties carved out of the territory formerly comprising the Western Judicial District. Wagoner, Muskogee, and Okmulgee Counties were all created out of this judicial district.

Freeland Francis died before statehood in the Western Judicial District of the Indian Territory within the present confines of Wagoner County. An administrator of his estate was appointed by the United States court for that district at Muskogee on the 25th day of March, 1907. These proceedings were transferred upon the advent of statehood to the County Court of Muskogee County.

On the 10th day of March, 1907, W. J. Cook was appointed guardian of the persons and estates of Amos Francis and Elizabeth Francis by the United States court for the Western District. These proceedings were subsequently transferred to the County Court of Okmulgee County because the minors resided in Okmulgee County at the time

Oklahoma became a State, and the constitution required guardianship matters to be transferred to the county of the minor's residence.

Now, the County Court of Muskogee County was no more the successor of the United States court than the County Court of Okmulgee County. The same can be said of the County Court of Wagoner County. All three of these courts, which are courts of general jurisdiction as to probate matters, are, by express provision of the act of Congress, declared to be the successors of the United States court for the Western District of Indian Territory.

Freeland Francis did not die in Wagoner County, because Wagoner County had not been created at the time of his death. He died in the Western Judicial District of the Indian Territory, and the court of that district had jurisdiction of his estate. The County Court of Okmulgee County, being the successor of that court, had just as much authority to approve a conveyance under the act of May 27, 1908, as did the United States court for the Western District of Indian Territory. The act provides that upon the sale of inherited restricted lands that "no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," and the United States court for the Western District of Indian Territory had the original jurisdiction. There is no question but that the County Court of Okmulgee County is one of its successors in probate matters, and the conclusion is unassailable that it had the power to approve the deed executed by the guardian of these minors.

There is yet another ground on which the approval by the County Court of Okmulgee County must be upheld: The various sections of the act of Congress of May 27, 1908, conferring jurisdiction upon the probate or county courts of Oklahoma are as follows:

Section 6 provides:

> "That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma, * * *."

In section 2 it is also provided:

> "That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents, * * * shall include all males under twenty-one years and all females under the age of eighteen years."

Section 9 of the said act reads as follows:

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: * * *."

Section 2 does not provide that the county courts shall have jurisdiction over the estates of minors, but it is over the "lands of minors." Now, upon the death of Freeland Francis and the selection of his allotment, the title to this land vested in the appellants and Mack Francis. As soon as title vested in Amos Francis and Elizabeth Francis the County Court of Okmulgee County acquired jurisdiction over this land. No other court could approve a sale without its consent, becuase it had control over the property of these minors and had authority to determine when their land should, or should not, be sold; and, furthermore, had the right to say what was a fair consideration and what was not. This power had been expressly conferred upon it by Congress.

On the other hand, section 9 provides that no conveyance of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. If that proviso is held to include the interests of minors, as well as adults, it would not only prevent the alienation of any minor's interest, unless the probate court having jurisdiction of the estate of the deceased allottee should also *happen* to have jurisdiction of the estate of the minor heirs, but it would also in practice nullify section 6, because the county court having jurisdiction of the inherited estates of full-blood minors could not exercise authority and control over them if another probate court had the power to approve or disapprove a conveyance executed by a guardian of such minor.

Section 9 and section 6 must therefore be read together. It was immaterial to Congress what probate court confirmed the sale of a minor's interest. Its purpose was to prevent the conveyance of any interest by a full-blood Indian, whether adult or minor, unless some probate court approved the transaction. If the proviso of section 9 be held to apply only to adult full-bloods, so that the probate court of the county having jurisdiction of the estates of deceased allottees would have authority to approve conveyances executed by adults, it would make the act harmonious, and section 6, giving to the probate courts jurisdiction of the estates of minors, would also be effective for that purpose. In other words, the courts designated by the proviso of section 9 would have jurisdiction to approve deeds executed by adult full-bloods, while the probate courts designated by section 6 would have authority to approve and confirm sales of interests of minor full-bloods made by their guardian.

So that the proviso of section 9 should read:

> "No conveyance of any interest of a full-blood Indian heir * * * shall be valid unless approved

> by the court having jurisdiction of the estate of said deceased allottee" (except in those cases where jurisdiction has been conferred upon some other court by this act).

This does not violate any rule of statutory construction; but, on the other hand, it is the duty of the court to harmonize all the various sections of the act, so as to give full force and effect to each, if possible.

Sections 2 and 6 of the act of May 27, 1908, giving probate courts jurisdiction over the person and property of minors is specific legislation relating to a particular class and it is a general rule that legislation of that character is not affected by general legislation in regard to many classes or subjects unless it clearly appears that the general provisions are so repugnant to the special that the legislators must be presumed to have intended thereby to modify or repeal it. The special and general legislation must stand and be read together, the former governing as to the particular class and the latter as to the general law upon other subjects or classes.

State *vs.* Stoll, 17 Wall., 425.

Washington *vs.* Miller, 235 U. S., 422.

The last-mentioned case passes upon the question as to whether or not the special legislation found in section 6 of the Supplemental Agreement, prohibiting non-citizens from inheriting, was repealed by the act of Congress of April 28, 1904, and in holding that it was not, this court says:

> "It next is insisted that the two provisos were repealed by a provision in the act of April 28, 1904 (33 Stat. at L., 573, chap. 1824), reading as follows:
>
> "'All laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise * * *.'
>
> "No repealing clause accompanied this provision, so the question is, Did it repeal the provisos by im-

plication? There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of its terms, for it made no mention of that law or of these lands. In short, it was plainly a general statute, and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, section 6 of the Supplemental Agreement and its two provisos dealt with that subject in specific and positive terms, which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: *First*, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States vs. Healey*, 160 U. S., 136, 146; 40 L. Ed., 369; 16 Sup. Ct. Rep., 247; *United States vs. Greathouse*, 166 U. S., 601, 605; 41 L. Ed., 1130; 17 Sup. Ct. Rep., 701); *second*, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend vs. Little*, 109 U. S., 504, 512; 27 L. Ed., 1012, 1015; 3 Sup. Ct. Rep., 357; *Ex parte Crow Dog* (*Ex parte Kaug Gi-Shin-Ca*), 109 U. S., 556, 570; 27 L. Ed., 1030, 1035; 3 Sup. Ct. Rep., 396; *Rogers vs. United States*, 185 U. S., 83, 87-89; 46 L. Ed., 816, 818-819; 22 Sup. Ct. Rep., 582); and, *third*, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

"No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians, whose affairs were peculiarly within its control."

In Morrison *vs.* Burnette, 154 Fed., 617; 83 C. C. A., 391, a question similar to the one here presented was before the United States Circuit Court of Appeals for the Eighth Circuit. It was there contended that an oil and gas lease sold at guardian's sale through the United States Court for the Western District of Indian Territory, after being confirmed and approved by that court, had to be approved by the Secretary of the Interior. Under the Supplemental Creek Agreement, the Secretary of the Interior had been given full power to approve leases on the allotments of Creek Indians. By the act of July 28, 1904, Congress enacted that "full and complete jurisdiction is hereby conferred upon the district courts in said Territory (Indian Territory) in the settlement of estates of decedents, the guardians of minors or incompetents, whether Indian, freedman, or otherwise." 33 Stat., 573. In holding that the confirmation by the court was sufficient and the approval of the Secretary of the Interior unnecessary, the Circuit Court of Appeals say:

> "In the light of the legislation to which reference has now been made there are two conclusive answers to the argument that the order avoiding the sale and the lease to the appellants was not a final order. In the first place the acts of April 28, 1904, and April 26, 1906, conferred 'full and complete jurisdiction' of the guardianship of minors, whether Indians, freedmen, or otherwise, and of the rental or lease of their allotments, upon the trial courts of the Indian Territory, and the later act repealed all acts and parts of acts inconsistent therewith. The provision of the act of June 30, 1902, that leases for mineral purposes might not be made without the approval of the Secretary of the Interior, is inconsistent with the grants of these later acts. There can be no full and complete jurisdiction of the guardianship of minor Indians and of the leasing of their allotments in a court whose judgments are reviewable and reversible by an officer of another department of the Government. Leases of allotments of Indian minors approved by the trial courts of the Indian Territory after April

26, 1906, were therefore not subject to approval or disapproval by the Secretary of the Interior. Those courts had full and complete jurisdiction to sell the leases and to finally approve and confirm the sales and the leases. The lease to the appellants is in this category. It was approved and the sale of it confirmed on June 11, 1906, and the order which approved it was therefore a final order."

The contention made in that case was similar to the contention made here. There it was contended that the lease must be approved by both the court having jurisdiction of the estates of the minors and the Secretary of the Interior. Here it is contended that the deed must be approved not only by the court having jurisdiction of the estates of the minors, but also by the court having jurisdiction of the settlement of the estate of the deceased, a court of co-ordinate jurisdiction and of equal rank. Certainly Congress could not have intended such an absurd and expensive procedure

V.

It was not intended by the act of Congress of May 27, 1908, to prohibit the sale of inherited lands owned by minors enrolled as full-bloods.

The act of May 27, 1908, is a comprehensive one. Prior to that time members of the Five Civilized Tribes had been divided into two general classes: full-bloods and mixed-bloods. This act, however, not only extends certain restrictions upon full-bloods, but also distinguishes those of less than half Indian blood from those of more than half Indian blood. Three classes of minors' allotments are dealt with:

1—Restricted allotments of *living* minors,
2—Unrestricted allotments of living minors,
3—Lands inherited by minors.

By section 1 of that act the allotments, including both surplus and homestead, of those minors enrolled as full-bloods and those enrolled as three-quarter-bloods, or more, were restricted for a period ending April 26, 1931. These, of course, follow within division one which we have designated as "restricted allotments of living minors."

The act further provides that the allotments of living minors who are enrolled as less than half-blood shall be free from all restrictions. Special provisions are made for the homesteads of minors who are enrolled as half-bloods and less than three-quarter-bloods. These fall within class two, designated as "unrestricted allotments of living minors." Section 6 reads as follows:

> "That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. * * * *Provided,* that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court, or otherwise."

Section 9 of this act provides that the death of an allottee shall operate to remove all restrictions, but contains the proviso that where the heirs of the deceased are enrolled as full-bloods, the conveyance must be approved by the county court having jurisdiction of the settlement of the estate of the deceased.

There is no question about the intention of Congress to give to the county courts of Oklahoma complete jurisdiction over the persons and estates of Indian minors. It intended to give these courts plenary power to deal with these estates except those minors falling within class 1. They have authority to sell all lands owned by minors except restricted allotments of "living minors." The act does not say that no "restricted lands of minors" shall be sold; the prohibition only extends to *restricted lands of living minors.* Congress

had some purpose in inserting the qualifying phrase "living minors." The words "lands of living" minors are used in an opposite sense to the words "inherited lands." By implication at least, authority is given the county courts to sell and dispose of restricted inherited lands. In other words, jurisdiction of the county courts of Oklahoma extends to the persons and estates of all Indian minors. That jurisdiction, however, is qualified in so far as the lands falling within class one are concerned, which we have designated as the restricted allotments of living minors. On lands falling within classes two and three, the jurisdiction of the courts to sell is unlimited. These classes include unrestricted lands of living minors and all inherited lands. This is the conclusion reached by the Supreme Court of Oklahoma in the case of Chupco *vs.* Chapman, 170 Pac., 259. That case involved the title to the allotments of Amos Chupco and Katie Chupco, both of whom died in the present confines of Hughes County prior to the advent of Statehood. Katie died on April 26, 1900, and Amos in September, 1907. They were enrolled as full-blood Indians. They left surviving them minor heirs who were also enrolled as full-blood Indians. A guardian was appointed by the county court of Hughes County for these minor heirs, and subsequently the interests of such minors were sold under proper orders of the county court to the defendant, James A. Chapman, and guardian's deeds were duly executed. This suit was brought to set aside these deeds on the ground that the lands were restricted within the meaning of the proviso of section 6. The Court reached the conclusion that lands of this character did not follow within the proviso, and held that the guardian's deeds were valid. This is in accord with the general interpretation placed upon this act by the bar of Oklahoma. The court, in rendering its opinion, says:

> "What did Congress mean when it inserted the proviso 'that no restricted lands of living minors shall be sold or incumbered, except by leases authorized by

law, by order of the court or otherwise'? The recognized function or office of a proviso and a saving clause is the same; that is, to except some particular case from a general principle where from peculiar circumstances attending the case there would be some hardship if it were not excepted, to qualify, restrain, or otherwise modify the general language of an enacting clause, or to exclude some possible ground of misinterpretation that might exist if cases which the Legislature did not mean to include were brought within the statute. Endlich on Interpretation of Statutes. * * *

"Generally a proviso should be construed with reference to the immediately preceding parts of the clause to which it is attached, but where it clearly appears from the context that such was not the intention of the Legislature, it will not be done, but a broader meaning will be given it, in order to give it the effect intended by the enacting body. The proviso under consideration is immediately preceded by language making an appropriation for salaries and expenses for representatives of the Secretary of the Interior, authorized by the act to inquire into and investigate the conduct of guardians and curators, etc., and from the very context it clearly does not qualify that part of section 6, making the appropriation.

"The proviso restricts and qualifies the jurisdiction conferred by the first clause of section 6 on the probate courts of the State over the persons and property of minor allottees of the Five Civilized Tribes, and the subject of the proviso is the restricted lands of living minors. The only restricted lands of minors thus far mentioned in the act are those individual allotments of living minors that were restricted by section 1 of the act. What, then, was the purpose of the proviso? We think to exclude some possible ground of misinterpretation that might exist, if such lands of minors as were restricted by section 1, and that Congress did not mean to include, were made subject to sale by the probate courts under the jurisdiction conferred by section 6. This language of section 6, conferring jurisdiction on the probate courts of the State over the persons and property of minor

allottees, is broad and comprehensive, and notwithstanding the fact that some of the lands of living minors were restricted by section 1, except for the proviso, it might be contended that section 6, coming later in the act, operated as a repeal of the restrictions placed by the terms of section 1 on certain allotments of living minors, and conferred jurisdiction on the probate courts to sell all the allotted lands of living minors. * * *

"According to Endlich on the Interpretation of Statutes, the question whether a proviso in whole or in part relates to and qualifies, restrains, or operates upon the immediately preceding provisions only of the statutes, or whether it must be taken to extend in whole or in part to all the preceding matters contained in the statute, must depend upon its words and import, and not upon the division of the act into sections. Bearing in mind these salutary rules of construction, we conclude that the inhibition against the alienation of 'restricted lands,' as the words are employed in the proviso of section 6, *supra*, had reference only to 'restricted lands' mentioned in the preceding provisions of the act, and not to inherited lands subsequently referred to and governed by section 9. Obviously it was the intention of Congress that the death of a minor allottee should operate to remove all restrictions on said allottee's land the same as from an adult allottee's lands, and we think the word 'living' was inserted in the proviso to make clear the purpose of Congress that the proviso was not intended to withdraw the allotments of deceased minors from the operation of section 9.

"The construction we have given the act harmonizes all its parts and effectuates the intent of Congress. In arriving at this view we have taken into consideration previous legislation with reference to the alienability of allotted lands after the death of the allottee. Thus it will be observed that by section 22 of the act of April 26, 1906, the adult heirs of any deceased Indian of either of the Five Civilized Tribes were authorized to sell and convey the land inherited from such decedent, and if there were both adult and minor heirs, then such minor heirs were authorized to join

in the sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory, and having in mind a possible change in the form of government, it was further provided that:

" 'In case of the organization of a State or Territory, then by the proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian.'

"Conveyances made under the provision of said section 22 by full-blood Indian heirs were to be subject to the approval of the Secretary of the Interior. It would seem then that Congress at all times from and after the passage of the act of April 26, 1906, intended that the allotments of deceased members of the Five Civilized Tribes should be alienable, and that the heirs should have the right to sell the land inherited from such decedent, subject to supervision, in the case of full-bloods and minors. Under the act of April 26, 1906, conveyances by full-blood Indian heirs were subject to the approval of the Secretary of the Interior, and under the act of May 27, 1908, such conveyances were subject to the approval of the county court having jurisdiction of the administration of the estate of the deceased allottee, and the probate courts of this State were granted jurisdiction over the persons and property of minor allottees.

"There is nothing in section 9 to indicate that Congress intended to draw a distinction between the adult full-blood heirs and the minor full-blood heirs with reference to the alienability of their inherited allotments, and it is reasonable to suppose that, if Congress intended that the interest inherited by full-blood minors in such lands should not be conveyed or subject to sale, it would doubtlessly have expressed such intention in unequivocal terms in section 9. There is nothing in the act of May 27, 1908, that evidences a change in the policy of Congress with reference to the alienability of such lands, except homesteads of certain allottees which are governed by the second proviso of section 9."

See also case of Crowe *vs.* Hardridge, 175 Pac., 115, in which the Supreme Court of Oklahoma held that plenary

power was vested in the county courts of Oklahoma to sell the interests owned by Indian minors in inherited lands.

The history of the legislation of Congress with reference to the allotments of Indian minors conclusively shows that it was not the intention to prohibit the sale of lands of this character through the probate courts. By section 4 of the Original Creek Agreement (act March 1, 1901) it was provided that allotments of minors should not be sold during minority. Section 22 of the act of April 26, 1906, changed the policy announced in the Original Creek Agreement and provided that inherited lands of minors could be sold by the guardian joining in the deed with the adult heirs under proper order of the court with the approval of the Secretary of the Interior. The act of May 27, 1908, substituted the "County Courts of Oklahoma" for the "Secretary of the Interior," and therefore it conclusively follows that these courts have the power to approve deeds of this character.

In all its legislation with reference to the Five Civilized Tribes Congress has shown an intention to make inherited lands less restricted than allotments in the hands of the original allottees. The act of May 27, 1908, is entitled "An Act to Remove Restrictions from Part of the Lands of Allottees of the Five Civilized Tribes," and in the body of the act Congress expressly disclaims any intention of imposing restrictions and provides that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act." Since lands of this character could be sold under the act of April 26, 1906, by the guardian joining in the deed with the adult heirs and since the act of May 27, 1908, gave the county courts of Oklahoma jurisdiction over lands of this character and disclaims any intention of imposing additional restrictions, it certainly follows that the county court has power to order a sale of this character, and a guardian's deed issued pursuant thereto is valid and must be upheld and sustained.

We call the court's attention to the fact that the procedure

followed in the sale of the Freeland Francis allotment has been the one generally followed throughout the eastern half of the State since this act went into effect, and guardians' deeds to lands inherited by full-blood minors have been universally held valid both by the courts and the bar of Oklahoma. Many thousands of acres of land of this character have been sold by the probate courts, and we do not know of a single instance where any lawyer ever questioned or disapproved the title. Numerous other objections have been raised to titles of this character and in numerous instances the State Supreme Court has been called upon to pass upon these objections; and in all those cases—and they are legion—the title to inherited lands of full-blood minors was never questioned on the ground that they were restricted within the meaning of the proviso of section 6 until the case of Chupco *vs.* Chapman, *supra.* Opposing counsel cannot cite a single case where a title like the one under consideration has been held bad by either the trial or appellate courts of either the State or Federal courts. The State Supreme Court is, of course, familiar with the views generally entertained of these titles by members of the bar and those views are in accord with the opinion in Chupco *vs.* Chapman.

Purchasers relying upon the advice of counsel have bought thousands of acres of land of this character in the eastern half of Oklahoma, and it is no exaggeration to say that millions of dollars have been paid out for oil lands upon the strength of the opinion generally entertained that these titles are good. There is probably not a lawyer in the State who has examined the titles to lands of this class who has not advised his clients that they are not restricted within the meaning of the proviso of section 6. For this court to reverse this holding at this time would be nothing less than a disaster. It would bring on a new flood of litigation upon a country already cursed with litigation and would result in hundreds of persons being dispossessed of lands who had purchased them with the earnings of a lifetime.

VI.

The appellants are concluded by the decree of the trial court holding that the Arkansas law of descent controls the devolution of this estate for the reason that no exceptions were taken to the holding of the court below on this point; and neither on appeal to the Circuit Court of Appeals nor on appeal to this court did the appellants assign as error this ruling of the trial court.

The appellants have filed a supplemental brief in which they contend that the Oklahoma law of descent and distribution designates the heirs and beneficiaries of this allotment. This is the first time that the correctness of the decision of the trial court on this point has been questioned. It seems to have occurred to counsel as an afterthought.

In the third paragraph of the decree (printed record, page No. 166) the trial court holds "that the Arkansas law of descent and distribution controls the descent of this land and upon the death of Freeland Francis and the issuance of certificate of allotment or patent to the above described tract of land, his mother, Annie Harris, inherited and became seized in fee simple of an undivided one-half interest * * *." By reference to this paragraph of the decision it will be seen that no exceptions were taken to this ruling.

On appeal to the Circuit Court of Appeals, not only did the appellants fail to assign any error on this ruling, but actually invoked the benefit of the ruling of the court on this point.

Their tenth assignment of error reads as follows: "The court erred in not quieting the title to a one-half interest in and to said lands of the plaintiff Annie Harris" (page 172, printed record). Had the Oklahoma law of descent governed, Annie Harris would only have acquired a one-fourth interest. In their appeal to this court the appellants have not assigned as error the ruling of the trial court on the law

of descent. Since they invoked the benefit of this rule in the Circuit Court of Appeals, and since they failed to assign as error the holding of the court on this point, they cannot at this time and in this manner question the correctness of the decree of the trial court.

Respectfully submitted,

WILLIAM M. MATTHEWS,
Solicitor for Appellees.

GEO. S. RAMSEY,
Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ANNIE HARRIS, formerly ANNIE FRANCIS et al., Appellants,
v.
HARRY H. BELL et al.
} No. 186.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF THE SOLICITOR GENERAL ON BEHALF OF APPELLANTS.

Now comes the Solicitor General and submits this brief on behalf of the appellants because of the duty of the United States toward the appellants as Indian wards of the Government whose rights are involved, the questions presented for determination also affecting materially many other cases presented to and pending before the Department of the Interior as to the proper procedure and ruling therein.

STATEMENT.

A full and complete statement of the case has been made in the brief of the appellants submitted by the Creek National Attorney. The same is re-

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ferred to and makes it unnecessary to restate the facts.

The three points passed upon by the Circuit Court of Appeals which deserve to be emphasized in this brief are:

1. Whether land allotted and patented to a new-born Creek Indian after his death passes to his heirs as an inheritance or as a direct allotment.

2. The effect of section 9 of the act of May 27, 1908, 35 Stat. 312, 315, upon the power of the Secretary of the Interior to approve after that act, a deed executed prior thereto by an adult full-blood heir.

3. Whether a deed of land so acquired made on behalf of the minor heirs is valid if approved by the court having jurisdiction of the guardianship of such heirs, in view of section 9 of the said act of May 27, 1908, requiring approval by the court having jurisdiction of the settlement of the estate of the deceased allottee.

The Court of Appeals held as to the first point that the heirs took by inheritance. This was adverse to the contention of the appellants and is also contrary to the view held by the Department of the Interior upon which its practice and procedure in such cases had been predicated.

The brief above stated already filed in behalf of the appellants presents sufficiently the adjudications of the courts and the contentions respecting them, but it may serve a useful purpose to supplement those citations with some references to the rulings of the Interior Department.

In a communication dated July 25, 1912, addressed to the Superintendent of the Union Agency, the First Assistant Secretary of the Interior, in a case similar to the one at bar, held that the heirs took a direct allotment and that section 9 of the act of May 27, 1908, *supra*, was inapplicable to a conveyance made by a full-blood Creek heir. This decision, which is referred to as the Benjamin Harrison decision in departmental practice, is unreported, but it is set forth in the appendix hereto (Appendix A).

The correctness of this holding was later questioned in the department but was adhered to in an unreported opinion rendered on December 10, 1913, by the Assistant Attorney General for the Interior Department in the Ida Folsom case (Appendix B). In that opinion reference is made to another unreported opinion by that same official in the Louis Francis case (Appendix C).

Upon the second point the Court of Appeals held that the act of May 27, 1908, was prospective in its operation and hence a deed executed by an adult full-blood heir before that act was effective might yet, after the act was operative, be approved by the Secretary of the Interior under the power given in section 22 of the act of April 26, 1906, 34 Stat. 137, 145.

The opposite view has been entertained by the Interior Department for about eight years. Since the decision of the Court of Appeals in this case was rendered, deeds made long ago have been presented to the Secretary of the Interior for his approval.

To pass upon these deeds after the lapse of years presents an obvious departmental difficulty in the matter of ascertaining the facts to be considered by the Secretary as a basis of approval or disapproval of such deeds. We are aware, of course, that this is not a controlling consideration.

Respecting the third point in the case, we firmly believe the Court of Appeals to be wrong in holding that the approval of the deed made on behalf of minor heirs by the court having jurisdiction of the guardianship of those heirs is sufficient.

Freeland Francis, the deceased allottee, died in the territory out of which Wagoner County, Okla., was created. The United States Court for the Western District of Indian Territory took jurisdiction of the intestacy proceedings, the State not then being organized. Subsequently, these proceedings were transferred to the County Court of Muskogee County. The deed was approved by the County Court of Okmulgee County.

It is clear, therefore, that the court which approved the deed was not "the court having jurisdiction of the settlement of the estate of the deceased allottee."

Since the statute is so clear in pointing out that the court having power to approve a deed executed on behalf of minor heirs is "the court having jurisdiction of the settlement of the estate of the deceased allottee" (section 9, act of May 27, 1908), it is plain that the construction given it by the Court of Appeals was erroneous.

The legislative intent is plain and the language is without ambiguity; therefore, the statute is not open to construction. *United States* v. *First NationalBank*, 234 U. S. 245, 258; *Mackenzie* v. *Hare*, 239 U. S. 299, 307, 308; *Caminetti* v. *United States*, 242 U. S. 470, 485–490.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed and the case remanded to the United States Court for the Eastern District of Oklahoma for further proceedings.

Respectfully submitted.

ALEX. C. KING,
Solicitor General.
FRANK K. NEBEKER,
Assistant Attorney General.

JANUARY, 1920.

APPENDIX.

"A."

INHERITED LAND CASE NO. 858; CONVEYANCE OF INHERITED LANDS OF BENJAMIN HARRISON, DECEASED CREEK ALLOTTEE.

DEPARTMENT OF THE INTERIOR,
Washington, July 25, 1912.

Mr. DANA H. KELSEY,
Superintendent Union Agency,
Muskogee, Oklahoma.

SIR: The department has considered your report of March 30, 1912, submitting for approval a conveyance dated January 7, 1911, executed by Ellen Cooper, purporting to convey to James A. Harris the interest of the grantor as a full-blood Indian in and to certain lands in the Creek Nation allotted to her as the heir of Benjamin Harrison, deceased.

This deed was submitted for departmental action because it was supposed that approval was necessary, in accordance with the opinion of the Attorney General of August 17, 1909, relating to conveyances of inherited lands in the Five Civilized Tribes. There is a question, however, whether said opinion is applicable to this case, the answer being dependent upon the class to which the land belongs, that is to say, whether it came to the grantor as an inheritance or as an original allotment.

Said Benjamin Harrison died in 1900, when an infant. He was survived by his father, Eli Harrison, his mother, Ellen Harrison, and by two brothers and a sister. His father died in 1909, prior to the execution of the deed now submitted for approval. His mother and the brothers and sister are living.

Upon the death of said Benjamin Harrison, his estate passed absolutely to his mother as sole heir, she being the "nearest relation" under the Creek law as construed by the Supreme Court of Oklahoma.

The allotment was selected in the name of Benjamin Harrison March 26, 1902, subsequent to the date of his death and at a time when the first Creek agreement was in effect.

That agreement, which is incorporated . the act of March 1, 1901 (31 Stat., 861), contains t' 'ollowing provision, which is a part of section 28 ..ereof:

> All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall *descend* to his heirs according to the laws of descent and distribution of the Creek Nation, and be *allotted* and distributed *to them* accordingly.

Out of the facts stated and the law quoted above, the question arises whether any right to the particular land in question ever vested in the decedent; also whether he ever had any estate of inheritance in the lands selected in his name. In other words, the question is, Did this land pass to Ellen Cooper, nee Harrison, as an inherited or an original allotment?

Before answering these questions, I will refer briefly to certain expressions of opinion heretofore rendered by the courts and the department. In an opinion rendered March 16, 1903, Mr. Van Devanter, then Assistant Attorney General for this department, advised the Secretary of the Interior that where citizens of the Creek Nation died before allotments were made in their names, it was unnecessary for the department to issue separate deeds or patents for their homestead and surplus allotments. The tenor of this opinion is clearly to this effect, that allotments in such cases were to be made directly to the heirs.

January 13, 1908, the department had occasion to determine whether a certain oil and gas lease of allotted lands in the Creek Nation was executed by the proper party as lessor. In that case the original allotment selection was predicated upon the citizenship and enrollment of Martha Wiley, who died August 16, 1899. The selection was made on the 21st day of October following. Construing the section of the first Creek agreement quoted above in connection with these facts, the department held that the allotment, which would have been the property of Martha Wiley had she lived, passed, not by virtue of inheritance but by grant from the Creek Nation, directly to her mother, Melissa Wiley, and therefore that the latter as owner of the fee was a proper party to execute the lease.

This conclusion was based upon the opinion of the Supreme Court in the case of *Hall* v. *Russell* (101 U. S. 503). In that case the court construed the act of Congress of September 27, 1850 (9 Stat. 496), commonly known as the Donation Act, granting to each person having certain qualifications the

right to settle upon and cultivate a tract of public land in Oregon not in any case exceeding in extent one section, in order that he might, by complying with all the conditions, including a residence of four consecutive years, and making proof thereof, be entitled to a patent for such tract. It was held that the title to the soil did not vest in the settler before the conditions had been fully performed, and that at his death, after a residence of less than a year upon the land, he had no devisable interest therein. The court said in part (p. 513):

> It was provided that the possessory right of a deceased settler should go to his heirs, and that they might get the land on making the requisite proof without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestor, but from the United States. The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees. * * * We attach no importance to the word "descend," as used in this section. In section 4 the word selected to convey substantially the same idea was "entitled." The thing done was to give the heirs of a settler the benefit of his rights and to designate them as the recipients of the bounty of the Government, instead of him.

In the decision of the Supreme Court rendered April 15, 1912, in the case of *Mullin and Jansen* v. *The United States*, the court had occasion to construe a similar provision in the Choctaw-Chickasaw agreement of 1902, relating to allotments to the heirs of

persons who died prior to receiving their shares of the lands and moneys of said tribe. The court referred to the similar provision in the Creek agreement of 1901, and quoted the opinion of Mr. Van Devanter of March 16, 1903, referred to above. The discussion of the Supreme Court following its reference to that opinion shows unmistakably that an allotment made under the circumstances presented in this case was undoubtedly regarded by the court as a direct grant or allotment to the heirs, and was not considered in any sense whatever as a conveyance of the allotted land of the ancestor.

In a still more recent case, decided May 14, 1912, by the Supreme Court of Oklahoma, it was held that a duly enrolled citizen of the Creek Nation, who died on March 1, 1901, without receiving his allotment or a certificate of selection therefor, died seized of no estate of inheritance therein.

In view of the foregoing, I am constrained to conclude that no right or title ever vested in the said Benjamin Harrison to the land constituting the allotment selected in his name; that he died seized of no estate of inheritance therein; and that the allotment when made passed by direct grant of the Creek Nation with the approval of the Secretary of the Interior to his heirs; and that they took said land not as an inherited but as an original allotment.

It is next to be determined what relation this conclusion sustains to the law relating to alienation of allotted lands and removal of restrictions therefrom and ascertain what duty devolves upon the department in the premises. Section 1 of the act of May 27, 1908 (35 Stat., 312), defines the status of the lands "*allotted* heretofore or hereafter to *allottees* of the Five Civilized Tribes" according

to the several classes of citizens as determined by their enrollment. It will be observed that this section makes no distinction between lands allotted to citizens by reason of their enrollment and those allotted to them by reason of the enrollment of others.

Section 4 of the same act provides that "allotted lands" shall not be subjected or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of restrictions, other than contracts expressly permitted by law. Here again the term "allotted lands" is used in a general sense, without reference to the origin of the allotment right.

Section 9 of the same act provides that the death of "any allottee" of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, subject to certain provisos. Clearly there is nothing in this section to suggest that a proper application of it would be restricted to inherited lands originally allotted to the ancestor.

As the consideration paid for this conveyance was apparently adequate, I am naturally disposed to approve the deed, and would do so were it not for the insuperable legal obstacles referred to above. My approval would accomplish nothing toward the validation of the deed, and the grantee, if he relied upon it, might ultimately, after holding the property for a period of time and improving the same at perhaps a great cost, lose everything. This case illustrates like many others the necessity of remedial legislation authorizing the Secretary of the Interior to adjust titles, as recommended by the department in its report of April 15, 1912, relating to Senate bill 6339.

As this land constitutes an original allotment, we must look to the laws governing the removal of restrictions and the sale of allotted lands for the relief of the petitioner rather than to those laws affecting inherited allotments. You are therefore directed to take up the matter with a view to the removal of restrictions from the land, and to permit the allottee to dispose of it by special sale to Mr. Harris. The value must be determined, however, as of the present time, as under the law no part of the consideration originally paid can be credited upon the new transaction except so much thereof as may be in the possession of the allottee at this time.

All papers are returned herewith.

Respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

"B."

DECEMBER 10, 1913.

The SECRETARY OF THE INTERIOR.

SIR: By your reference, I am in receipt of the letters of the Commissioner of Indian Affairs of November 10 and December 1, 1913, requesting my opinion on the legal questions involved in the matter of the attempted conveyance by Ida Folsom, as sole heir of Lizzie Franklin, a deceased Choctaw, of certain lands selected and allotted after the death of the latter.

It seems that this deed was submitted to the superintendent of the Union Agency with request for approval by the Secretary of the Interior, but that the superintendent, pursuant to the opinion of the First Assistant Secretary of the Interior of July 25, 1912, in the Benjamin Harrison case, advised the petitioner to the effect that the land in question having been selected after the death of the ancestor, passed as a direct grant from the tribe to Ida Folsom, instead of by inheritance from Lizzie Franklin.

It is contended: (1) That the case now under consideration does not fall within the ruling of the Harrison case; (2) that the department misconstrued the law in the opinion rendered in that case; and (3) that the right to alienate having once attached to the land, it is beyond the power of Congress to impose restrictions.

In the Harrison and Franklin cases the facts, in all material respects, are similar. In each case the land was selected after the death of the ancestor, the land

became alienable prior to the act of April 26, 1906 (34 Stat., 137), and the attempted conveyance was made after that act.

I therefore conclude that the rule adopted in the Harrison case is applicable to the Franklin case.

The second question involves a matter of statutory construction. Having considered the subject fully in my opinion of December 6 [10], 1913, relating to the contested oil and gas lease covering the allotment of Louis Francis, I deem it unnecessary to discuss the question at length. It is sufficient to repeat the conclusion then reached, that allotments of tribal lands of the Five Civilized Tribes, selected after the death of the ancestor, pass by direct grant of the tribe to the heirs instead of by inheritance. If the conclusion is correct that allotments, in such cases, are, for the purposes of the division of common property, direct grants, it seems to me that it would be inconsistent and illogical to hold that for purposes of distribution in the family such allotments are estates of inheritance.

It may be well, perhaps, to emphasize particularly the fact that in this, as in the Harrison case, the attempted conveyance was made subsequent to said act of April 26, 1906. The importance of this is due to the significance given by the court in the case of *Mullen* v. *United States* (224 U. S. 448) to the fact that the deeds then under consideration were executed prior to the act of April 26, 1906.

It might be well to add also that the conveyance discussed in *Reed* v. *Welty* (197 Fed., 419) was made prior to the act last mentioned and hence that there is no necessary conflict between the decisions in these cases and the decision rendered by the department in the Benjamin Harrison case.

The third question, being of a fundamental nature, is more serious. It challenges the power of Congress to enact the legislation in question. As to this, it seems to me that if Congress was satisfied that it possessed the necessary power to legislate in this way for the protection of the Indians, the correctness of this opinion should not be questioned by the executive branch of the Government, particularly by the Interior Department, which must necessarily stand, in so far as it reasonably can, for that construction which will benefit the people whose interests are especially intrusted to its care and guardianship. Aside from any other consideration, I think it would be inappropriate for me, even if I were disposed so to do, to express an adverse opinion concerning the power of Congress in this request before final determination of the case of *United States* v. *Bartlett and Lashley*, now pending in the Supreme Court upon an appeal taken by the United States.

Premises considered, you are advised that in my opinion the deeds executed by Ida Folsom should not at this time be approved, but that parties who presented same should be advised that they may elect whether deeds shall be returned to them without any action by the department or held here without any action until the final determination of *United States* v. *Bartlett et al.*

The papers received in the Franklin case with the Commissioner's letters are herewith.

Very respectfully,

PRESTON C. WEST,
Assistant Attorney General.

"C."

DECEMBER 10, 1913.

The SECRETARY OF THE INTERIOR.

SIR: You have referred to me for an opinion in the matter of contested oil and gas lease covering allotment of Louis Francis, deceased, referred to in letter of September 20, 1913, from the Second Assistant Commissioner of Indian Affairs, in which letter the facts in reference thereto are stated as follows:

> On June 24, 1913, the department approved an oil and gas lease executed by Annie Givens, nee McGilbra, and Robert Francis, as sole heirs of Louis Francis, deceased. Parts of the lease were forwarded to the superintendent of Union Agency for appropriate distribution, but before delivery of the said parts, a protest was filed with the superintendent by E. C. Bothwell, claiming to represent certain parties who had purchased the land, objecting to the approval of the lease or the delivery of the parts thereof. It appears that Louis Francis, deceased infant, full-blood Creek Indian, was born March 1, 1900, and died August 8, 1901, survived by his mother, Annie McGilbra. The superintendent reports that it is shown that said Louis Francis was the illegitimate child of Annie Givens, nee McGilbra, and that upon examination of the records of the Commissioner to the Five Civilized Tribes, evidence was discovered tending to show that said Annie McGilbra, mother of Louis Francis, was at one time the wife of Robert Francis. The superintendent also reports that said Louis Francis was enrolled as the child of Rob-

> ert Francis, and therefore considered it proper that said Robert Francis should join in the execution of the lease. The land described in the lease was regularly allotted to Louis Francis on December 20, 1902, which was subsequent to the death of the allottee. It appears that conveyances were made on November 22, 1904, March 24, 1905, July 5, 1907, July 9, 1907, and August 9, 1907, by Annie Givens and William Givens, her husband, and Robert Francis and his wife, Millie Francis. On March 8, 1909, Annie Givens and Robert Francis executed a warranty deed purporting to convey to George W. Barnes all their right, title, and interest in and to the land involved, which deed was approved by the county judge of McIntosh County on March 15, 1909.

Reference is also made in the letter to the departmental decision of July 25, 1912, in the Benjamin Harrison case, wherein it was decided that where a Creek citizen entitled to an allotment died without receiving the same, such citizen was seized of no estate of inheritance therein, and that the allotment made to his heirs passed to them by direct grant of the nation, and that they took said land not as an inherited, but as an original, allotment. The letter concludes:

> As there seems to be a conflict between the decision of the department and the decisions of the Federal courts as to whether the heirs would take said land as an inherited or as an original allotment, the papers are transmitted herewith for the opinion of the Assistant Attorney General.

There is but a single point of difference in fact between the Benjamin Harrison case and that here presented, viz, that in the former, Benjamin Harrison,

the original beneficial cause of the allotment in question, died prior to the ratification of the original Creek agreement, whereas in the case in hand, Louis Francis, the beneficial cause of this allotment, did not die until August 8, 1901, or nearly three months subsequent to the ratification of the original Creek agreement. I can not believe, however, that this makes any essential difference.

In the case of *Shulthis* v. *McDougal* (170 Fed., 529) the court thus states the facts:

> Andrew J. Berryhill was the son of George Franklin Berryhill, a member of the Creek Nation of the mixed blood, and Clementine Berryhill, his wife, a noncitizen of that tribe. He was born on the 6th day of May, 1901, and died in the month of November of that year, leaving no brothers or sisters surviving him. At no time during his life was he entitled to enrollment as a member of the tribe, or to an allotment of its property. After his death, by the supplemental agreement entered into between the Commission to the Five Civilized Tribes and commissioners of the Creek Nation (act June 30, 1902, c. 1323, 32 Stat., 501), proclaimed by the President August 8, 1902, it was provided in section 7, as follows:
>
> All children born to those citizens who are entitled to enrollment under previous acts, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission.

Andrew J. Berryhill met precisely the conditions of this agreement. He died, however, before the agreement was entered into, as already stated. * * *

And the court said:

> The word "descend" is, of course, inapplicable to the actual contingency provided for by

the statute, because that contingency contemplates the death of the child before he had actually become seized of any interest in the land. The word "descend" is a word of art, and indicates the transference of property by inheritance. If any significance is to be given to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seized of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall "descend," but also declares that it shall be "allotted and distributed," to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.

These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seized of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

* * * * *

We next pass to the rights of the parties to this controversy under the conveyances from George Franklin Berryhill. On June 5, 1906, he and his wife executed a warranty deed of the property to Edmund and Perry McKay in consideration of the sum of $2,000. It is now contended that this deed was void because at the time of its execution the grantor was

without legal capacity to make such a conveyance. It is conceded that George Franklin Berryhill had only such power to dispose of the lands in question as was granted to him by act of Congress. Both parties base their right upon section 22 of the act approved April 26, 1906, which reads as follows:

> That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe, * * * may sell and convey the lands inherited from such decedent.

George Franklin Berryhill and appellant Shulthis make the same argument upon this statute that they did upon section 7, above quoted. It is urged that the land in question is not "inherited" land. For reasons already explained, that contention, while technically right, is substantially wrong. The scheme of the statute clearly indicates that the land was to be regarded the same as if it had been inherited. No sound reason can be adduced for treating these lands otherwise than they would have been treated if Andrew J. Berryhill had survived long enough to receive the allotment. This interpretation is further supported by the provision of the several acts dealing with these allotments. Every member of the tribe was allotted a share in the tribal lands. Such allotment is repeatedly spoken of in the act as his "homestead." It was intended to be such, and to serve as a sure basis for his own support and the support of his family, either actual or prospective. To protect this homestead, it was made inalienable for the term of five years. The reasons for making it inalienable did not apply to lands obtained by

> inheritance, and for that reason the statute last quoted was passed granting power to convey the same. The lands here in question fall under the same policy as lands obtained by inheritance, and the statute should be held to apply thereto. Berryhill, therefore, had power to make the deed to the McKays.

In considering the Shulthis-McDougal case, however, it must be borne in mind that it was decided almost three years prior to the decision of the Supreme Court in the Mullen case, hereinafter referred to, and the further fact that no party concerned in the case was asserting that the lands were free of restriction until after the passage of the act of April 26, 1906, and that all parties based their rights upon the proper construction of section 22 of the last-named act.

In *Mullen* v. *United States* (224 U. S., 448) the lands involved were allotted in the name of Choctaw Indians whose names appear upon the roll, but who died after the ratification of the agreement and before receiving an allotment. The deeds in question were made by their heirs, who were Choctaws of the full blood, and said deeds were dated prior to April 26, 1906. After discussing the various provisions of the Choctaw-Chickasaw agreement and pointing out that there was no substantial difference in purpose and effect with reference to the Creek agreement, Mr. Justice Hughes, who delivered the opinion of the court, proceeded to say:

> In both cases the lands were to go immediately to the heirs, and the mere circumstance that under the language of the statute the allotment was to be made in the name of the deceased ancestor instead of the names of the

heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.

We have, then, a case where all the allotted lands going to the heirs are of the same character and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell "surplus" lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands, respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon a part of them.

There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were "allotted lands," and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which in the absence of any provision to the contrary was the subject of sale. The fact that they were "full-blood" Indians makes no difference in

this case, for at the time of the conveyances in question heirs of the full-blood taking under the provisions of paragraph 22 of the supplemental agreement had the same right of alienation as other heirs.

In *Reed* v. *Welty* (197 Fed., 419), the District Court of the United States for the Eastern District of Oklahoma, the facts were—

> that Thomas and Mary Knight, husband and wife, were duly enrolled full-blood Creek citizens. They had three children, London, Ramsey, and Robert Knight, also duly enrolled full-blood citizens of the Creek nation. Thomas and Mary Knight, the parents, both died intestate in 1901, before receiving their respective allotments, leaving surviving them the three children mentioned as their heirs. After the death of the parents, the land in controversy was allotted to their heirs. Subsequently, and on July 26, 1904, the plaintiff purchased from London and Ramsey Knight their respective interests in the land, securing from them a warranty deed therefor in consideration of $1,300, which deed was duly recorded, and the said London and Ramsey Knight delivered to plaintiff the full possession and control of the land so far as their interests were concerned. Robert Knight was and still is an infant. Plaintiff has been ever since, and now is, either in person or through his tenant, in open, notorious, and adverse possession of said land, and at the time of the execution of the deed by London Knight to defendant hereinafter mentioned, the said London Knight was not in possession of the land, and had never received any rents from the same. On July 28, 1908, London Knight and his wife, Susan Knight, executed to the defendant a deed for an undivided one-third

interest in the land, who had the same approved by the county court, and had the same recorded.

The court upon demurrer to the bill setting forth the foregoing facts, held that the decision in the Mullen case, although primarily dealing with the Choctaw-Chickasaw agreement, was equally applicable to the Creek agreement, and concludes as follows:

> * * * In the Creek agreement the commission is dealing with another of the Five Tribes, but with the same object in view, that of the allotment of the tribal lands to the individual members, and the agreement is so similar to the Choctaw-Chickasaw agreement in terms and arrangement that the two classifications of allotments found by Justice Hughes in the latter agreement may also be said to exist in the former, and, as in the Choctaw-Chickasaw agreement, the restrictions upon alienation must be held to have only applied to the first class; that is, allotments to members of the tribe living at the time of allotment.
>
> It follows that on July 26, 1904, London and Ramsey Knight had an alienable interest in the land in question, and the demurrer must be overruled. So ordered.

Subsequently, and on February 3, 1913, the Supreme Court of Oklahoma, in *Deming Investment Company* v. *Bruner Oil Company* (130 Pac., 1157), had before it precisely the question dealt with in *Reed* v. *Welty*, supra, and reached the same conclusion as was reached by the District Court for the Eastern District of Oklahoma. No reference, however, is made in the opinion to the decision in *Reed*

v. *Welty*, but the whole is bottomed upon the decision in *Mullen* v. *United States*. The facts were that Martha Hohlahta, who was a full-blood citizen of the Creek Nation, died in May, 1899, at the age of 2 years, leaving surviving her no brothers or sisters or descendants of such, and leaving as her only heirs at law her mother and father, Cheparn and Lucy Hohlahta, who were also full-blood citizens of the Creek Nation. On the 6th day of April, 1904, the name of Martha Hohlahta was placed by the Commission to the Five Civilized Tribes as a full-blood Creek Indian, and the lands in controversy allotted to the heirs of the deceased as her homestead on the 13th day of the following July. Thereafter patent was issued, designating the same as a homestead, and on the 27th day of May, 1905, Cheparn and Lucy Hohlahta executed and delivered their warranty deed to Charles W. Loeffler, and by mesne conveyances passed to a trustee for Deming Investment Company January 18, 1906. On the 15th of April, 1907, Cheparn and Lucy Hohlahta executed and delivered an oil and gas mining lease on the same lands to the Bruner Oil Company. The question presented was whether the Deming Investment Company had derived good title by virtue of its previous conveyance, or whether the original Indian owners still held the title so as to enable them to make a lease to the Bruner Oil Company. It was held by the court that Cheparn and Lucy Hohlahta took said lands free from restriction upon alienation,

and their conveyance on the 27th day of May, 1905, passed the title out of them to their grantors. It was said:

> An Indian having died before taking an allotment, the land he was entitled to receive as an allotment descends directly to his heirs under the law of descent and distribution named, and shall be allotted and distributed to them accordingly. The land allotted to the heirs of deceased is neither homestead nor surplus, and there is no more reason for applying the restriction upon the alienation of the surplus to this entire allotment than there is to apply the restrictions upon the alienation of homesteads.

While it must be confessed that the last three decisions referred to are apparently somewhat paradoxical, it is to my mind, nevertheless, clearly deducible therefrom that an allotment made on account of an Indian who never lived to receive the same himself, and who therefore never was at any time during his life seized of any estate in the land, is a direct allotment to those who, for the want of a better term, are denominated his heirs, but who are in reality only persons whom the statute points out as the first takers. *Stevenson's Heirs* v. *Sullivant* (5 Wall., 207), and further, that lands so allotted were without any restriction upon alienation up to the passage of the act of Congress approved April 26, 1906 (34 Stat., 137).

It must be equally apparent that under the doctrine of the Shulthis case, *supra*, and the case of *United States* v. *Knight and Avery*, decided by the United States Circuit Court of Appeals for the eighth circuit, at the May term, 1913, but not yet reported, a conveyance by the full-blood father and mother of

the deceased child, on whose account this allotment was made, duly approved by the county court of the county having jurisdiction of the settlement of his estate, would be effectual to pass the title to the lands in question to the grantee in such deed, no other reason for its invalidity appearing.

There is no showing nor attempted showing in any of the papers submitted to me that the deeds of November 22, 1904, March 24, 1905, and March 8, 1909, are invalid for any other reason than because of supposed restrictions upon alienation to be found in the acts of Congress. Indeed, it would be very questionable whether such an issue could rightfully be investigated and determined by this department. It is apparent, therefore, that whatever title Annie McGilbra and Robert Francis had in these lands passed out of them long prior to the execution of the lease in question, which bears date February 21, 1913.

From the papers submitted to me it appears that the lease was approved June 24, 1913. Had this been an absolute and unqualified act on the part of this department it would have presented a very serious question as to whether any further jurisdiction remained to cancel or require such appro or refuse delivery of the document. By amendments to the rules with regard to such leases, approved May 13, 1913, and effective June 1, 1913, it is provided, section 26:

> Operations will not be permitted under any lease requiring approval of the Secretary of the Interior until the approved lease has been delivered. If there has been a contest respecting a lease or leases, the approved, disapproved, or cancelled parts thereof will be held in the office of the superintendent for five days after

promulgation by him, by mailing or delivery, of the department's decision, and will not be delivered if within that period a motion for review or reconsideration be filed, until such motion is passed upon by the department.

It does not definitely appear from any of the papers submitted to me precisely when notice of the approval was given to the United States Indian superintendent at Muskogee, nor in exactly what form the protestant, E. C. Bothwell, first made his objection. The letter from the acting superintendent of September 12, 1913, makes the following statements:

> In connection with the above, I have the honor to advise that on or about the time notice of approval of the lease and accompanying papers were received at this office, E. C. Bothwell, claiming to represent the parties who had purchased the land, objected to the approval of the lease or the delivery of the copies of the parts thereof until he had had an opportunity to file a formal protest.
>
> Subsequently, and on July 31, 1913, the protest of Mr. Bothwell was received, a copy of which was in due course of business furnished the attorneys of the lessee, and both the lessee and protestant were given a limited time within which briefs or arguments in support of their respective contentions might be filed.
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> On August 30, 1913, this office received a brief, submitted by Joseph P. Rossiter, of Coffeyville, Kansas, attorney for Andrew T. Sticelber, in which it is contended that the lease to his clients should be delivered and that the protest against same should be dismissed on the ground that the land involved was restricted for the reason that the case on principle is precisely the same as the case of Benjamin Harrison, deceased, decided by the

First Assistant Secretary of the Interior on July 25, 1912.

It does sufficiently appear, however, from the rule cited and from the action in the Indian superintendent's office that the approval of the lease in question, June 24, 1913, was not intended to be final, unqualified, and irrevocable, and that proceedings were taken to present matters to the department showing particular grounds for rescission of the tentative approval made. I, therefore, suggest that a formal order reconsidering the approval and canceling and vacating the same be made and that this order be indorsed upon the several parts of the lease now on file, and that said several parts of the lease be returned to the party from whom they were originally received.

Respectfully,

PRESTON C. WEST,
Assistant Attorney-General.

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